

Part V. Operational Typologies of Bills: Interpretative Approach

Chapter X

Particular Aspects

Section I. Commencement ¹

10.1.1 In Respect of Jural Relations

‘Commencement’, used with reference to an Act, means the day on which the Act comes into force; i.e. the day when the assent of the Governor or the President, as the case may be, is first published in the official gazette of the State.

An Act cannot be said to commence or to be in force unless it is brought into operation by legislature enactment or by the exercise of authority by a delegate, empowered to bring it into operation.

Legislatures have plenary power of legislation within the field of legislation committed to them; and subject to certain Constitutional restrictions, they can legislate prospectively as well as retrospectively. It is, however, a cardinal principle of drafting that every statute is prima-facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But, the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is “deemed to be prospective only *nova constitutio futuris formam imponere debet non praeteritis* (i.e. “A new law ought to regulate what is to follow, not the past”).

As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. It is not necessary for

¹ G.P. Singh, op cite, Note No. , pp. 315-338..

an express provision to be provided so as to make a statute retrospective. On the other hand, the presumption against retrospectively may be rebutted by necessary implication, especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

The rule against retrospective construction is not applicable to a statute merely because a part of the requisites for its action is drawn from a time antecedent to its passing. If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefore, not retrospective merely because it applies also to those to whom pre-amended Act was applicable, but because the amended Act came into force from the date of its amendment and not from an anterior date. But this does not mean that a statute, which takes away or impairs any vested right acquired under existing laws or which creates a new obligation or imposes a new burden in respect of past transactions, will not be treated as retrospective.

10.1.2 In Respect of Procedure

In contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible. As stated by Lord Denning: The rule that an Act of parliament is not be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence. If the new Act affects matters of procedure only, then, prima-facie, it applies to all actions in pending as well as future ones.

The classification of a statute as either substantive or procedural does not necessarily determine whether it may have a retrospective operation. For example, a statute of limitation is generally regarded as procedural but its application to a past cause of action has the effect of reviving or extinguishing a right of suit. Such an operation cannot be said to be procedural. It has also been seen that the rule against retrospective construction is not applicable merely because a part of the requisites for its action is drawn from a time antecedent to its passing.

The principle is that parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned about them unless otherwise a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that parliament will make it clear if that is intended.

10.1.3 In Respect of Regulating Transfers

Statutes enacted for regulating succession are not applicable to successions which had already opened, as otherwise the effect will be to divest the estate from persons to whom it had vested prior to coming into force of the new statute. The material point of time, for applicability of a law altering the order of succession is the date when it opens thereafter.

Statutes prescribing formalities for effecting transfers are not applicable to transfers made prior to their enforcement, and similarly statutes dispensing with formalities which were earlier necessary for making transfer have not the effect of validating transfers which were lacking in these formalities and which were made prior to such statutes. A transfer made in contravention of a statutory prohibition is invalid and is not validated by repeal of the statute containing the prohibition and permission obtained to make a transfer, under a law which allows transfer or permission is of no avail if the law is amended before the transfer, prohibiting transfer completely.

10.1.4 In Respect of Limitation

Statutes of limitation are regarded as procedural and the law of limitation which applies to a suit is the law that came into force at the date of the institution of the suit, irrespective of the date of accrual of the cause of action. The object of a statute of limitation is not to create any right, but to prescribe periods within which legal proceedings may be instituted for enforcement of rights which exist under the substantive law. But, after expiry of the period of limitation, the right of suit comes to an end. Therefore, if a particular right of action had become barred under an earlier limitation Act, the right is not revived by a later Act.

When the later Act provides a shorter period of limitation than that provided by the earlier Act, a right of suit, which is subsisting according to the earlier Act on the date when the later

Act comes into operation, will not be taken to be extinguished. If there is still time even on the basis of the later Act within which such a suit can be filed, the right has to be availed of within that period, and the benefit of the earlier Act is not available. Condoning delay in such cases in filing the suit or claim will be governed by the provisions of the later Act and not by the provisions of the earlier Act. But if the shorter period provided in the later Act had already expired on the date of its enforcement, the suit can be filed within a reasonable time after the commencement of the later Act. Otherwise the effect of the later Act would be to extinguish a subsisting right of suit, an inference which cannot be reached except from express enactment or necessary implication.

To avoid these complications when a later limitation Act enacts shorter periods, it is usual to postpone its coming into effect for some reasonable time, or to make provision for a time gap within which the benefit of the earlier Act can be taken. Statutes of limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operation for enforcing causes of action accrued earlier, but they are prospective in the sense that they neither have the effect of reviving a right of action which was already barred on the date of their coming into operation, nor do they have the effect of extinguishing a right of action subsisting on that date. But a statute may, expressly or implicitly by retrospectively extending limitation, revive a barred claim.

10.1.5 In Respect of Fiscal Matters

Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to the charging section and other substantive provisions and does not apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. But a procedural provision, as far as possible, will not be so construed as to affect finality of tax assessment or to open up liability which had become barred. Assessment creates a vested right and reassessment cannot be carried out unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective.

10.1.6 In Respect of Remedial and Declaratory Statutes

Just as the fact that a prospective disqualification under a statute results from anterior misconduct that renders the statute insufficient to be retrospective, so also the fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts, does not necessarily make the provision retrospective.

A remedial Act is not necessarily retrospective; it may be either enlarging or restraining; and it takes effect prospectively unless it has retrospective effect by express terms or necessary intendment.

The presumption against retrospective operation is not applicable to declaratory statutes. For modern purposes, a declaratory Act may be defined as an Act to remove doubts existing as to the Common Law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what parliament deems to have been a judicial error, whether in the statement of the Common Law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the words '*it is declared*' are not conclusive that the Act is declaratory; for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective.

Section II. Statutes Controlled by Issues of Constitution

10.2.1 Operation Controlled on Considerations of Constitutionality

A statute is controlled so as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*. There is, therefore, a presumption that the legislature does not exceed its jurisdiction, and the burden of establishing that Act is not within the competence of the legislature, or that it transgresses other constitutional mandates, such as those related to fundamental rights, is always on the person who challenges its vires. "*Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the constitution it must be allowed to*

stand as the true expression of the national will". The principle is, however, subject to the expression that once the citizen is able to establish that the impugned legislation has invaded his fundamental rights under Article 29 of the Constitution, Ethiopia should be capable to justify that the law is saved under Sub-Art (6) of the same Article. The onus shifts to the state to satisfy that the restrictions imposed are reasonable and in the public's interest.

"There is a general presumption that a legislature does not intend to exceed its jurisdiction, and there is ample authority for the propositions that general words in a statute are to be construed with reference to the powers of the legislature which enacts it".

If the enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved. When the Act is held to be in part inconsistent with the higher law in the Constitution can it partly be saved, if the test of severability is satisfied. The test is not of textual severability, but of substantial severability which permits even modification of the text in order to achieve severance.

10.2.2 Operation Controlled on Considerations of Territoriality²

(I) General — In case of legislatures which may for convenience be called non-sovereign legislatures like those of Colonies, Australian States or Canadian Provinces, it has been said that they are incompetent to legislate with extra-territorial effect. This is only a convenient mode of stating that a law made by such a legislature must bear a real territorial connection with the subject-matter which it is dealing. Before the statute of Westminster, 1931, the Dominion Parliaments were also subject to the same limitation. This principle or rule, forbidding extra-territorial legislation, has been characterized "*as a doctrine of some what obscure extent*". The obscurity lies in defining by any exact formula the territorial nexus which will be sufficient for holding the legislation intra vires. "Any connection" which is "relevant" or "real" with the exercise of the power of the state concerned has been held to be sufficient. And at times, stress has been mainly laid on the topic of legislation committed to

² Id., pp. 364-376.

the legislature. But it is also equally well established by high authority that “*a connection is too remote*” or which is “*completely irrelevant*” will not be enough for holding the legislation intra vires.

Even when the legislative competence is not restricted on considerations of territorial nexus, it is presumed that statutes are not intended in the absence of contrary language or clear implication, to operate on events taking place or persons outside the territories to which the statutes are expressed to apply. Thus, there is a general principle applicable to Income-Tax Acts that either the source from which the taxable income is derived should be within the territorial limits of the country imposing the tax or the person whose income is to be taxed should be resident there.

10.2.3 Operation Controlled on Consideration of International Law

The presumption that a statute is not intended to apply to persons outside the territories of the State enacting it is particularly strong in case of foreigners; for as to them the normal presumption is further strengthened by another presumption that the legislature intends to respect the rules of International Law.

Simply, if a term of a statute is clear and unambiguous, they must be given effect to whether or not they carry out the state's treaty obligations, for the sovereign power of legislation extends to breaking treaties and any remedy for a breach of an international obligation lies in a forum other than the state's municipal courts.

